No. 12941

# In the United States Court of Appeals for the Ninth Circuit

FEDERAL POWER COMMISSION, APPELLANT

*v.*

ARIZONA EDISON COMPANY, INC., APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA*

## BRIEF FOR APPELLEE

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## BRIEF FOR APPELLEE

### PRELIMINARY STATEMENT

The Commission brief herein is artfully adroit and carries a veneer of plausibility developed by the device of numerous assumptions of fact and of law.

In effect, the basis and oft-repeated assumption underlying the first division of counsel's argument (Comm. 11-21)[1] is that the Commission, having whatever jurisdiction it deems necessary "under statutory or other authority" (Comm. 5), its order, even though invalid and void when issued because outside the orbit of its authority under the Federal Power Act, nevertheless thereafter may become valid, authoritative and immune from attack. Such is the result claimed in this case because Arizona Edison (sometimes herein referred to as the "Company") elected to meet the issue of invalidity of the Commission Opinion-Order of March 31, 1950, at such time as the Commission should seek judicial enforcement thereof.

[1] References to the Commission Brief herein will be identified by the abbreviation "Comm."

The assertion that Arizona Edison claims that it "could deprive the Commission of . . . . authority by its nonappearance and nonparticipation in the Commission proceeding" (Comm. 10, 17), is clearly an invention of Commission counsel. The Company made and makes no such claim. Actually, the Commission argument is that it acquired personal jurisdiction over Arizona Edison by mailing a copy of its "show cause" order to the Company, despite the denial of such jurisdiction to the Commission by Congress in the Federal Power Act.[2] The refusal of Arizona Edison to respond or appear before the Commission could not affect whatever lawful authority, if any, the Commission possessed. But the fact that the Company neither responded nor appeared created one of the problems now bothering the Commission.

As the result, the Commission finds it necessary to erase the jurisdiction of the District Court as *the court* of enforcement under Section 317 of the Act, a point which will be examined with some particularity later herein. The contention is that the District Court in *all* enforcement proceedings is merely an automatic mechanical rubber stamp, in effect not a court at all, just a Commission constable (Comm. 21).

The authority of the Commission being plenary, so it is said (Comm. 13), its counsel waste no time in analysis or discussion of either the statutory jurisdiction of the Commission contained in Section 201 of the Act, or the broad and "exclusive jurisdiction" conferred upon the District Courts of the United States by Section 317 of the Act.

The Commission authority to issue and serve original process is claimed to arise from various regulatory sections of the Act, other than Section 201, from its rules and regulations, and out of the "necessity" of the case (Comm. 5, 11-15). Even though

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2 See *Fed. Power Comm. v. Panhandle Eastern Pipe Line Co.*, 172 F (2d) 57, 61 (C. A. 3), affirmed 337 U. S. 498, wherein it is stated: "The appellant's argument points further to the Commission's order of November 10 in which it directed the Company to show cause why the transfer of the leases should not be set aside and directed maintenance of the status quo pending determination. This is an order no doubt. But if it is not a valid order because beyond Commission jurisdiction, the Commission cannot have court help to enforce it."

this is an appeal from a judgment dismissing a Commission action for enforcement (Comm. 1), counsel nevertheless devote much of their brief to "court review of orders" pursuant to Section 313(b) of the Act, a subject not herein involved (Comm. p. 21, et seq.).

A mere casual reading of Section 313(b) discloses that no general jurisdiction, exclusive or otherwise, is delegated thereby to the Court of Appeals. That Court can acquire exclusive jurisdiction in a particular case only if and after petition for review has been filed and then only "upon the filing" by the Commission in that court of "a transcript of the record upon which the order complained of was entered".

Counsel's complaint (Comm. 2, 8) that "because the District Court did not render an opinion or offer any explanation of its acts . . . .", the Commission is at a loss to define the issues herein involved, is untenable on the face of the record. The specifications of the motion to dismiss by Arizona Edison and of the motion for summary judgment by the Commission, both of which were argued at length before the District Court, the brief of the Arizona Corporation Commission *amicus curiae,* concurred in by the National Association of Railroad and Utility Commissioners, in support of Arizona Edison's motion to dismiss, as well as the extensive "Statement of Points" in this Court (R. 94-100), all make abundantly clear the questions involved here and now. Counsel's complaint evidently is a device to avoid in their "Specifications of Errors" referring to, and thereby to circumvent, the legal burden resting on the Commission "to prove that its order is valid and based upon a statutory grant of power", if it is to be entitled to judicial assistance (*Fed. Power Comm. vs. Panhandle Eastern Pipe Line Co., infra*).

There is no allegation, even by way of conclusion, in the Commission complaint (which it declined to amend, R. 88-89), that Arizona Edison was a "public utility" under the Power Act. The charge is that "it appears" to the Commission that Arizona Edison

was violating the Commission order of March 31, 1950 (R. 3) and that the Commission found Arizona Edison to be a "public utility" (R. 8-9). Accordingly, the Commission brief is impressively silent as to the "public utility" status of Arizona Edison under the Act.

Jurisdiction is the sole issue in this case. That question has three facets, to wit:

Point One: Did the Commission have authority under the Act to summon Arizona Edison to Washington by its self-appointed processes not provided in the Act?

Point Two: Did the Commission under the Act, even had Arizona Edison responded to the "show cause" order, have subject matter jurisdiction over the "facilities" of Arizona Edison, or any thereof?

Point Three: Did the District Court have jurisdiction to examine and determine the jurisdiction of the Commission, both personal and subject matter, and of the court itself, should the court find as it did that the Commission's order was invalid and void because in excess of its statutory authority?

Opposing counsel do not face any of the foregoing questions.

As to Point One, a very considerable portion of their brief is devoted to the proposition that "The Commission's order was within its authority", and that the Commission had authority to "issue the exact kind of order" as the Opinion-Order of March 31, 1950 in this case (Comm. 5, 9-10, 11-16, 16-17, 17-21). No contention is made that the particular order under review was or is valid. Counsel's discussion is largely academic and entirely immaterial in this case. But, be that as it may, the precise question here involved is the lawful authority of the Commission under the Act to summon Arizona Edison to appear before it (R. 42-45). If the Commission was without authority under the Act to issue and serve by mail, or otherwise, original process

whether designated as a rule, order, "order to show cause", or otherwise, it could not acquire personal jurisdiction over Arizona Edison unless such invalid service was waived, as it was not (R. 57-58; Comm. 5). The Commission's preliminary procedures being void, any order issued by it in reliance thereon likewise would be void on its face, a principle not discussed in the Commission brief.

Counsel's assumption is that, under various administrative and regulatory sections of the Act (Secs. 203(b), 301, 307-309; Comm. 11-15), other than the jurisdictional Section 201 thereof, and particularly under Section 309 entitled "Administrative Powers of the Commission; Rules, Regulations and Orders", from which counsel make fragmentary and partial quotes (Comm. 9, 12, 13), the Commission "necessarily" has plenary substantive powers beyond and greater than those delegated to it in the Act (Comm. 15). It is further assumed in the brief (Comm. 5), that a Commission rule (18 C.F.R. Sec. 1.6(d) ) entitled "Orders to Show Cause", adopted in 1948, supplies the authority not delegated to the Commission by the Act itself.

The principle is thoroughly established by the authorities that an administrative agency cannot enlarge its statutory power by the issuance of orders and rules and regulations covering matters not in the framework of the governing statute. The purpose, and the only purpose, of rules and regulations is to implement the powers specifically and expressly delegated to the agency by Congress, not to rewrite the legislation. Nor can the agency assert the existence of an alleged congressional intent not disclosed in the language of the Act.

The precise argument herein advanced by opposing counsel, that the Commission's alleged authority under consideration stems from specific administrative and regulatory sections applicable only to a "public utility" under the Act, and from its rule making authority (Comm. 12-15), recently was advanced by the Commission before the Supreme Court with respect to the parallel

sections of the Natural Gas Act. That Court was not impressed with the argument and disposed of it decisively (*Fed. Power Comm. v. Panhandle Eastern Pipe Line Co., infra*).

The Commission here, as in the District Court, declines to discuss Point Two, that the Commission was without subject matter jurisdiction over Arizona Edison or any of its facilities, and therefore its order of March 31, 1950 was invalid and void on its face when issued. The silence of Commission counsel is more audible than words. The Commission thus places itself in the very strange and untenable position of seeking enforcement of an order, the validity of which it refuses to vouch for.

As will be made manifest later herein, it is a logical conclusion that the Commission is thus entirely unwilling to argue or discuss the validity of its order, because of absence of subject matter jurisdiction, in view of the fact that the governing jurisdictional provisions of Section 201 were so clearly and pointedly examined and applied by the Supreme Court in *Connecticut Light and Power Company v. Federal Power Commission,* 324 U. S. 515, 89 L. Ed. 1150, 65 S. C. 749, discussed hereinafter.

In counsel's treatment of Point Three, in the second subdivision of the Commission argument, entitled "The Commission's order may not be reexamined in a district court proceeding for its enforcement" (Comm. 21-32), the significant fact is the entire failure of counsel to examine the explicit and unambiguous provisions of Section 317 of the Act entitled "Jurisdiction of Offenses; Enforcement of Liabilities and Duties". This enforcement action was brought in the District Court, and it is here for review, under authority of Section 317.

The only regulatory authority which the Commission proposes to exercise over Arizona Edison relates to accounting matters. These, as well as other aspects of the Company's operations, are fully regulated under the laws of Arizona. There is no regulatory "gap" involved. The Commission simply proposes to take over certain of the duties of the state authorities.

## STATEMENT OF THE CASE

In view of the evasion by the Commission of the true issues presented in this case, it becomes necessary for purposes of clarity to restate the case, correctly to disclose to this Court the judicial problems involved.

### 1. The Commission Procedure

The proceedings which culminated in the Commission order of March 31, 1950 were initiated by the Commission on its own motion. By "Order to Show Cause" (R. 42-45) mailed to Arizona Edison by the Secretary of the Commission (R. 71-72), the Company was ordered to submit to the then asserted jurisdiction of the Commission, unless by answer within forty-five days it could prove to the satisfaction of the Commission that it was not a "public utility" under the Power Act. The burden of proof, however, is on the Commission.[3] Arizona Edison made no response to such "order", nor did it enter its appearance at any stage of the proceeding, on the stated ground (R. 57-58) that the Commission under the provisions of the Federal Power Act was without jurisdiction over it or any of its facilities.

Thereafter, the Commission ordered a hearing to be held on June 6, 1949, copy of which order was mailed to the Company. *On June 1, 1949, the Commission by order fixed Washington as the place of such hearing. This order of June 1, 1949, mailed to the Company, was received by it on June 6, 1949, after the hear- was in progress (R. 71-72).* As above pointed out, the Federal Power Act contains no provision authorizing the Commission to issue or serve by mail or otherwise original process. The Act confers no authority on the Commission to enforce its directive to appear.[4] The "Order to Show Cause" and the purported service

[3] *Federal Power Comm. v. Panhandle Eastern Pipe Line Co.,* infra; *National Labor Relations Board v. Goodyear Footwear Corp.,* 186 F (2d) 913, 917 (C. A. 7, 1951)

[4] "The statute (Federal Power Act) confers no authority upon the Commission to enforce its directions to appear . . . . " *Federal Power Comm. v. Metropolitan Edison Co.,* 304 U. S. 375, 386, 58 S. C. 963, 82 L. Ed. 1408, 1415.

thereof by mail were without legal sanction, authority or effect. The only manner in which the Commission is permitted by the Act to secure enforcement of its orders, is by proceedings under Sections 314(a), 314(b) and 317 entitled respectively "Enforcement of Act, Regulations and Orders", and "Jurisdiction of Offenses; Enforcement of Liabilities and Duties."

## 2. Operations of Arizona Edison as Set Forth in Opinion-Order March 31, 1950.

"Arizona Edison is an Arizona corporation with its principal office in Phoenix, Arizona. It is engaged, solely in the State of Arizona, in the business of transmitting electric energy, and distributing and selling it at retail. (R. 15) . . . .

. . . . . .

"Arizona Edison owns and operates eight separate electric systems scattered through central and southern Arizona, among which are the Maricopa, Coolidge-Florence, and Yuma Systems. These three systems, the only ones involved in this proceeding, supply ultimate consumers alone in their separate service areas, and all receive electric energy generated by the United States Bureau of Reclamation ("Bureau") in California at the Parker Dam and in Nevada at the Hoover Dam. The Yuma System also receives energy generated by the Bureau at its Siphon Drop Generating Station in California. (R.19)

. . . . .

"From Parker the Bureau transmits energy generated there in California—often mingled with energy generated at Hoover in Nevada—over its two 161 kv lines a distance of 137 miles to the Bureau's substation at Phoenix, Arizona. At Phoenix, a part of this energy is delivered to Central Arizona and to the Salt River Valley Water Users Association; the remainder of this energy is transmitted in a southeasterly direction over a 115 kv line owned by the Bureau to Coolidge, Arizona, 53 miles from Phoenix, where part is delivered to the United States Indian Irrigation Service ("Indian Service"), and to Tucson, Arizona, where part is delivered to The Tucson Gas, Electric Light and Power Company.

"Part of the energy that the Indian Service receives from the Bureau at Coolidge it transmits 23 miles in a southwesterly direction over its 69 kv line and delivers at its Casa Grande substation to Arizona Edison's Maricopa System, which is located about 40 miles south of Phoenix. Arizona Edison transmits such energy . . . . 9.6 miles west to its Sexton substation over its 69 kv line without serving any customers between Casa Grande and the Sexton substations. At this substation the energy is stepped down and converted for service to an irrigation pumping load in the area. (R.20).

. . . . . .

"At Coolidge, the Indian Service delivers some of the out-of-state energy received from the Bureau . . . . at 12 kv to Arizona Edison's Coolidge-Florence System. Part of this energy is transmitted by Arizona Edison from Coolidge in a northeasterly direction to Florence over its 11.5 mile, 12 kv line, which connects substations in the two towns, and serves no customers along the route.

"The Bureau delivers out-of-state energy . . . . to Arizona Edison's Yuma System, located in the extreme southwestern corner of Arizona, at Arizona Edison's Mesa substation and at the Bureau's Headquarters substation in Yuma, and so furnishes almost the entire requirements of this system. This energy is transmitted at 34.5 kv from the Bureau's Gila substation about ten miles east of Yuma and from the Bureau's Siphon Drop generating station to the north in California. Energy reaches the Gila substation on the Bureau's 116-mile, 161 kv line from Parker Dam.

"The Yuma System includes several 34.5 kv lines and their attendant substations.

"The longest of these lines commences at the Mesa substation in Yuma, passes the municipal limits, and extends in a southwesterly direction through agricultural areas about 12 line miles to a substation in the incorporated city of Somerton . . . . and thence about 7 line miles further to a substation in the unincorporated community of Gadsden . . . . , 19 miles in all without serving customers. At these substations, and at two others which are served by the line between Yuma and Somerton, the energy is stepped down 34.5 kv to 4 kv,

and lines at the lower voltage, some of which are supported on the same poles as the 34.5 kv lines for various distances, emanate from each of the substations to serve the adjacent localities including the towns of Somerton and Gadsden. The Mesa- Gadsden line, therefore, serves the function of transmitting energy in bulk from the Mesa substation in Yuma to the several substations referred to above where local distribution begins for service to the respective communities and agricultural areas.

"Another 34.5 kv line extends eastward from the Mesa substation about 13 miles, serving a substation at an airport and one customer about three miles from its terminus, and also supports on the same poles a 4 kv secondary line for about three miles. Other 34.5 kv lines are .5, 1.25, and 1.5 miles in length. These lines, the Mesa-Gadsden line, and the airport line are used to transmit out-of-state energy and serve no customers directly except the airport and one other customer on the airport line mentioned above." (R. 21-23)

It is not contended by the Commission that Arizona Edison either owns or operates or has any interest or control whatever in any part of the facilities by which the electric energy generated outside of Arizona, is delivered to its local Maricopa, Coolidge-Florence, and Yuma Systems (R. 19, 20, 21-23). The only possible claim for subject matter jurisdiction over any of the facilities of Arizona Edison is the fact that electric energy, generated outside of the State of Arizona, enters certain of the local system facilities of the Company. However, as above stated, the Commission refuses to discuss subject matter jurisdiction at all.

## 3. Other Relevant Matters

The Commission lays considerable emphasis (R. 5, 16, 38-39, 41-43, 48-49, 51-52, 53; Comm. 4, 14), upon the letter by General Counsel of Arizona Edison, dated March 10, 1948, to the Commission (R. 48-49), in connection with the Matter of California Electric Company, Docket No. IT-6096, then pending before the Commission upon the application of California Electric, a "public utility" under the Act, for a Commission order

authorizing the sale of certain property of that Company in Yuma County, Arizona, to Arizona Edison. It is not clear just what proposition the Commission is trying to establish thereby. In the first place, it is entirely evident that Arizona Edison could not, by letter or otherwise, create subject matter jurisdiction in the Commission or waive the non-existence of such jurisdiction in that agency. Secondly, the letter was not in the nature of a waiver of personal service to be effective at some later time, and could not be so construed. In the third place, the letter did not state that which the Commission and its counsel repeatedly have declared it stated, to-wit: (Comm. 4) "Arizona Edison had agreed to set up a special reserve assuring compliance with such conditions as the Commission might attach to the Company's acquisition of the facilities, *if it should be established that the Company was a 'public utility'*" (Emphasis added). The letter actually reads (R. 48-49): "Without prejudice to the right of the Commission, *if it so elects to have adjudicated in a lawful, separate and subsequent proceeding . . . .*" The foregoing language was advisedly addressed to a judicial enforcement proceeding, the only procedure in which the Commission could elect *"to have adjudicated"* the "public utility" status, if any, of Arizona Edison. The Company simply declined to submit itself to the Commission which then, as now, had no jurisdiction over it or any of its facilities.

The District Court did not have before it the report of the field investigation by the Commission staff (Comm. 6), the Trial Examiner's intermediate decision (Comm. 7-8), or any part of the evidence, consisting of both oral testimony and exhibits, received at the "public hearing" of June 6, 1949 (Comm. 7). None of these were attached to or made a part of the Commission's complaint herein.

## SUMMARY OF ARGUMENT

On the record as made and now before this Court, Arizona Edison will present its argument under the following specifications:

I. The Commission is without legal authority to issue and cause to be served original process, in the nature of a complaint and summons, however labelled, except as specifically authorized so to do by statutory authority. As applied to this case, the Commission was without jurisdiction to issue authoritative legal process ordering and commanding Arizona Edison to appear before it by answer or personal appearance, prior to the judicial determination that the Company or some part of its facilities were subject to the jurisdiction of the Commission under the Act. That such process was invalid and void appears on the face of the record.

II. The Commission is without subject matter jurisdiction to enter a valid enforceable order finding Arizona Edison to be a "public utility" as defined in the Act or to order the Company to comply with any of the regulatory provisions of that Act, applicable only to a "public utility". The mere fact that electric energy generated outside of Arizona is conveyed into Arizona and there sold and delivered by federal agencies into three of the local systems of Arizona Edison does not create Commission jurisdiction over any of the "facilities" of such local systems. The invalidity of the Opinion-Order of March 31, 1950 appears on the face thereof.

III. It is the duty of the District Court in an enforcement proceeding under Section 317 of the Act, and of this Court on review of the judgment of the District Court in such action for enforcement, to examine into and determine whether the Commission had jurisdiction to enter the order involved and, also, whether the District Court had jurisdiction to enforce such order. If the Commission order be invalid, there is no order for the District Court to enforce, for under such circumstances, the only order the Court could enter, as in this case, is one dismissing the action.

ARGUMENT

## I

### The Commission is Without Legal Authority to Issue and Cause to be Served Original Process in the Nature of a Complaint and Summons, However Labelled, Except as Specifically Authorized So to do By Statutory Authority.

The Federal Power Act is entirely silent as to the issuance and service of original process by the Commission, except as expressly authorized in certain sections for the purpose and upon the conditions stated in such sections.

In Section 10(f) of Part I of the Power Act (being the Federal Water Power Act as amended August 26, 1935), the Commission is authorized on the conditions stated to summon the owner of an "unlicensed project" to appear before it "after notice" for a particular stated purpose. The Commission, of course, has a continuing jurisdiction over a "licensee" who, by becoming such, has submitted himself to the jurisdiction of the Commission.

Under Section 202(a), (b) and (c) of Part II of the Act, entitled "Interconnections and Coordination of Facilities", the Commission is specially authorized for the purposes of said Section 202 and on the conditions therein stated, to "give notice" bringing before it the parties in interest.

In Section 207 of Part II of the Act, entitled "Furnishing of Adequate Service", the Commission is expressly authorized on certain stated conditions to "give notice" to the interested persons of "opportunity for hearing" and thereafter to make findings and enter the appropriate order, rule or regulation.

In Section 209 of Part II of the Act, entitled "Use of Joint Boards; Cooperation with State Commissions", the Commission is given specific enumerated powers for the purposes of such Section.

In Section 307 of Part III of the Act, entitled "Investigations by Commission; Attendance of Witnesses; Depositions", the Commission is given wide investigative powers and "for the purpose of any investigation or any other proceeding under this Act" the Commission is authorized "to subpoena witnesses, compel their attendance . . . . require the production of books . . . . and other records which the Commission deems relevant or material to the inquiry . . . . from any place in the United States at any designated place of hearing . . . ." And court aid may be invoked in cases of contumacy or refusal to obey a subpoena issued by the Commission. Similarly, any person may be required to appear and make deposition.

It will be observed that while a wide power of subpoena is delegated to the Commission in aid of its broad investigatory powers, the only delegation of authority to issue original process in the nature of summons is found in specific sections, none of which are involved in this case, and such authority is available only for the stated purposes of the particular sections. The authority to issue complaints and summons, and to cause service thereof to be made, is much more fundamental than the authority to issue and serve subpoenas. In the former, personal and property rights are involved, while in the latter situation no rights of a truthful witness are affected or jeopardized.

After investigation "whenever it shall appear" to the Commission that the Act, or any order, rule or regulation of the Commission is or will be violated, the Commission has ready access to the District Court of the United States under Section 314 of the Act, to which courts "exclusive jurisdiction" over such matters is delegated by Section 317 of the Act.

The Act is silent as to so-called "jurisdictional proceedings", which seems to be the foundation of the argument of opposing counsel that of "inherent necessity", "necessarily", the Commission not only must have "authority to investigate coverage" which, of course, is delegated to it by the Act, but also it must have

authority to issue and cause to be served original process to determine jurisdiction. It is asserted, "Determination of that question ("coverage", "jurisdiction") by the Commission was authorized when necessary or appropriate to the enforcement of the Act, both by general provisions relating to violation and by *specific regulatory* provisions" (Emphasis added) (Comm. 12).

Counsel claim to find the desired power particularly in Sections 307-309 of the Act, from which fragmentary quotations, out of context, are made in their brief (Comm. 12, 13, 14).

Section 307 relates only to "Investigations by the Commission; Attendance of Witnesses; Depositions". But investigation is one thing and judicial adjudication is quite something else. It is not charged that there was interference at any time with the Commission's investigating processes.

Section 308 relates to "Hearings; Rules of Procedure", "under this Act" and "under the authority of this Act". So far as hearings are concerned, the Commission is authorized to "admit as a party" any and all interested persons. However, nothing is stated about commanding the attendance of any person at any such hearing. Obviously, a person who has submitted to the jurisdiction of the Commission as a "public utility", and who in fact is a "public utility" within the statutory language, is thereafter subject to the continuing jurisdiction of the Commission over it or over such of its facilities as are covered by the statutory grant of power. That situation is quite different from the one here involved, wherein Arizona Edison does not admit that it is a "public utility" under the Act and there has been no judicial determination that it is such a "public utility". In the normal case, a person who is clearly subject to the jurisdiction of the Commission under the Act would waive personal service and make an appearance. There would be no reason for such person doing otherwise. But, by the same token, there is no reason why any person who is not, or has reasonable grounds to feel that he is not, a "public utility" under the Act should waive service and submit to the Commission

jurisdiction. The statute provides a method by judicial enforcement to determine such questions, which are judicial and not administrative; and, as legal questions, they are not within the peculiar technical and skilled competence of administrative agencies. *Brannan v. Stark,* 185 F (2d) 871, 875 (C.A.D.C. 1950).

The argument erroneously attributed by counsel to Arizona Edison that "it will not suffice for the Company to claim as it did in effect in oral argument in the District Court that it could deprive the Commission of such authority (that is, to enter its order) by its nonappearance and nonparticipation in the Commission proceeding" (Comm. 17), simply begs the question. If the Commission has authority to issue original process and cause service thereof to be made as in this case, then whether the Company appeared and participated, or did not appear and did not participate, would not deprive the Commission of such jurisdiction. On the other hand, if the Commission is without authority to issue original process and cause service thereof to be made as in this case, then it cannot acquire such authority unless the Company waives the absence of lawful personal service, which was not done in this case.

Other sections of the Act, and particularly Section 203, entitled "Disposition of Property; Consolidations, Purchase of Securities" and Section 301, entitled "Accounts, Records and Memoranda", it is argued, give the Commission the authority attempted to be exercised in this case, because in each of such sections there are provisions for "notice" and "opportunity for hearing". In Section 203 the "notice and opportunity for hearing" is authorized only after and pursuant to application *by a "public utility"* for Commission approval, in connection only with the particular subject matter of that section. The authority of the Commission under Section 301 is limited to "licensees and public utilities" and it is these only to whom the "notice" and "opportunity for hearing" is to be directed.

Clearly, the regulatory sections of the Act cannot be resorted to *for the purpose of determining whether the company involved is a "public utility" under the Act.*

> "The court below, following a statement in Hartford Electric Light Co. v. Federal Power Commission, 131 F. 2d 953 (C.C.A. 2d, 1942), held that this 'but' clause 'is intended to make it clear that this jurisdiction extends even to local facilities where the Act provides for their regulation, as it does in the case of accounting practices.' *This seems to get the cart before the horse, for whether the Act provides for such regulation depends on whether the facilities are under the jurisdiction of the Commission; the Commission's jurisdiction does not depend on some independent application of the regulatory provisions.*" (Emphasis added)

*Connecticut L & P. Co. v. Federal Power Comm.,* (1945), 324 U.S. 515, 527, 65 S. C. 749, 89 L. Ed. 1150, 1159.

Unless a person such as Arizona Edison is a "public utility" under the Act, the regulatory sections in question have no application whatever to it. It was so held by the Supreme Court of the United States in *Federal Power Commission v. Panhandle Eastern Pipe Line Company, infra,* wherein Mr. Justice Reed, speaking for the Court, declared with respect to certain of the parallel provisions of the Natural Gas Act:

> "The Commission cites §§ 5(b), 6(a) and (b), 8 (a), 9(a), 10(a), and 14(b) to show that Congress intended 'to confer a certain measure of authority upon the Commission' over the production and gathering of gas. These sections empower the Commission to make investigations, to prescribe rules for the keeping of accounts and records by the natural gas companies, and to require that the companies file such reports as are deemed necessary by the Commission in the proper administration of the Act. These powers are inquisitorial in nature and were designed to aid the Commission in exercising its powers and 'to serve as a basis for recommending further legislation to the Congress.' Section 14(b), quoted below, comes closest to supporting the Commission's argument but that confers only power

to obtain information. Although these sections bear evidence of congressional consideration of the relationship of production properties to other elements of the natural gas business, they do not even by implication suggest to us an extension of the regulatory provisions of the Act to cover incidents connected with the production or gathering of gas.

. . . . . .

"The Commission urges it has jurisdiction over the transaction between Panhandle and Hugoton from the powers granted to it by § 7(c) of the Act which authorizes it to issue certificates of convenience and necessity for the interstate transportation and sale of natural gas and those granted to it by §§ 4 and 5 to determine reasonable rates for such transportation and sale. . . . . Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms. Thus §§ 4(a), (b), (c), 5(a) and 7(c) speak of 'transportation or sale of natural gas subject to the jurisdiction of the Commission' while § 7(a) and (b) refer respectively to ' transportation facilities' and 'facilities subject to the jurisdiction of the Commission.' Nothing in the sections indicate that the power given to the Commission over natural gas companies by § 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words 'subject to the jurisdiction' makes clear to us the intent to keep the Commission's hands out of the excepted local matters. The same answer applies to petitioner's argument that § 16 gives it authority to stop sales of leases. *The power to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions.* (Emphasis added)

"The Federal Power Commission leans heavily upon § 7(b) which provides that no natural gas company may abandon any of its facilities subject to the jurisdiction of the Commission without prior approval of the Commission. The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue serv-

ice; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.'

"To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. . . . . .

". . . . . We can not attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power."

*Federal Power Commission v. Panhandle Eastern Pipe Line Co.* (1949) 337 U. S. 498, 505-514, 69 S.C. 1251, 1256-1260, 93 L. Ed. 1499, 1505-1509

That the Commission may not enlarge, extend, add to, alter or amend the Power Act by its rules and regulations or other administrative orders is well settled. The power to make such rules, regulations and orders as are proper or necessary to carry out the provisions of the governing statutes is administrative only and not the foundation for the exercise of plenary powers. Legislation may not be enacted under the guise of the exercise of the rule making power. If attempted, it is a mere nullity. When the Congressional purpose is to delegate to any agency authority to issue and serve original process, such power must be, and is, granted expressly and with particularity. See, for example, National Labor Relations Act, Section 10(a) and (b), 29 U. S. C. A. Sec. 160 (a), 160(b);

Federal Trade Commission Act, 15 U.S.C.A. Sec. 45(a), 45(b). Such provisions are conspicuously absent from the Federal Power Act.

*Manhattan G. E. Co. v. Commr.,* 297 U.S. 129, 134, 80 L. Ed. 528, 531, 56 S. C. 397

*Campbell v. Galeno Chemical Co.,* 281 U. S. 599, 610, 74 L. Ed. 1063, 1069-70, 50 S. C. 412

*Jones v. Securities and Exchange Comm.,* 298 U. S. 1, 56 S. C. 654, 80 L. Ed. 1015

*Louisville & Nashville R. Co. v. United States,* 282 U. S. 740, 758, 759; 75 L. Ed. 672, 684; 51 S. C. 297, 304

*Stark v. Wickard,* 321 U. S. 288, 309, 310; 88 L. Ed. 733, 747, 748; 64 S. C. 559, 571

*Jaeger v. Simrany,* 180 F. 2d 650, 653 (C.A. 9, 1950)

*United States v. Youngstown Sheet & Tube Co.,* 171 F. 2d 103, 110, 111 (C.A. 6, 1948)

*62 Cases, More or Less, each containing 6 Jars of Jam, et al v. United States,* (1951) 340 U.S. 593, 71 S.C. 515, 95 L. Ed. 443.

Counsel themselves differentiate their several cases cited under the argument headings, "The numerous court decisions on review of similar Commission orders confirming the Commission's authority" (Comm. 16), and "The Commission's authority was not dependent upon the Company's appearance or participation in the Commission proceedings" (Comm. 17), by their statement (Comm. 18), "While it is true that in the cases discussed above the parties involved had in fact appeared and participated in the Commission proceedings, the results reached in no case depended upon that fact". The fact that the companies involved in the particular cases referred to waived their personal rights to require the Commission to bring an enforcement proceeding can hardly serve to establish the proposition that the Commission had authority to summon them to appear and defend themselves. The argument is backhanded and proves nothing, except that the various companies voluntarily appeared before the Commission.

Even a company admittedly and judicially determined to be a "public utility" or "natural gas company" under the applicable Act, and under actual and continuing Commission regulation, is not bound by and may ignore with impunity an order of the Commission entered in excess of its statutory authority. *Colorado Interstate Gas Co. v. Fed. Power Comm.,* 185 F (2d) 357, (C.A. 3, 1950); *Fed. Power Comm. v. Panhandle Eastern Pipe Line Co.,* 172 F (2d) 57, (C. A. 3, 1949); affirmed in 337 U. S. 498, 69 S. C. 1251, 93 L. Ed. 1499, *supra.*

Further seeking to buttress its position, the Commission argues the so-called "primary jurisdiction" rule (Comm. 18-20). However, where there is no jurisdiction whatever, it is difficult to see how the so-called "primary jurisdiction" rule can come into play.

Moreover, whatever jurisdiction, if any, the Commission had in this case, it was exhausted before the Commission came to the District Court for an order of enforcement. Arizona Edison made no attempt to interfere in any way with the Commission's administrative activities. It simply stood by for a judicial determination as to whether it is a "public utility" under the Act, should the Commission wish to invoke the aid of the District Court to determine that status. The "primary jurisdiction" rule has application only when an effort is made, through the courts, to interfere with or stop the administrative processes, whatever they may be.

> "The first answer the Commission makes to the contention that regulation of this transaction is beyond the authority which the Congress granted it, is to say that it is now an established principle of administrative law that the administrative body or agency is, in the first instance, its own judge of the scope of its jurisdiction. Several Supreme Court decisions are cited to us in support of this suggested principle. Macauley v. Waterman Steamship Corp., 1946, 327 U. S. 540, 66 S. Ct. 712, 90 L. Ed. 839; Oklahoma Press Publishing Co. v. Walling, 1946, 327 U. S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531; Endicott Johnson Corp v. Perkins, 1943, 317 U. S. 501, 63 S. Ct. 339, 87 L. Ed. 424; Myers v. Bethlehem Shipbuilding

Corp., 1938, 303 U. S. 41, 58 S. Ct. 459, 82 L. Ed. 638. See Nathanson, Some Comments on the Administrative Procedure Act, 41 Ill. L. Rev. 368, 409 (1947); cf. Berger, Exhaustion of Administrative Remedies, 48 Yale L. J. 981, 992 (1939). This Court is not unfamiliar with the decisions cited nor the problems they present, and it quite realizes the risks of making sweeping generalizations in a developing field of the law. We think the one suggested to us is too sweeping. The instances cited were cases where courts came in between the litigant and the agency, and blocked, or refused to assist, the carrying out of duties imposed by the lawmaking body upon the agency. The Wages and Hours Administrator cannot, of course, determine whether a given operation in a particular factory is subject to the statute until he finds out what the operation is and then finds out if the provisions of the law are being obeyed by the factory owner. Oklahoma Press Publishing Co. v. Walling, 1946; 327 U. S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531. But in this case no court is stepping between the Commission and the performance of its job. The Commission is on the other hand, seeking court help, which it admits is discretionary, in a situation where its investigatory powers have been unopposed. See 2 Vom Baur, Federal Administrative Law § 825 (1942). When a party plaintiff seeks court help, it must show that it is entitled to such help. In determining whether a plaintiff is entitled to the relief asked, the court cannot escape the responsibility of deciding whether plaintiff has been given rights or powers for which court sanction is now sought."

*Fed. Power Comm. v. Panhandle Eastern Pipe Line Co., supra,* at pages 59-60, of 172 F (2d).

"But another point raised by the government counsel is that the assessment, not having been appealed from, was *res judicata* and conclusive, and defendant was precluded from showing the contrary.

"It is true that the Internal Revenue Act of 1864 authorizes the Commissioner of Internal Revenue, on appeal to him made, to remit, refund and pay back all taxes erroneously or illegally assessed or collected (sec. 44), and the amended Act of July 13, 1866, declares that no suit shall be maintained for the recovery of any tax alleged to have been erroneously or illegally

assessed or collected until such appeal shall have been made, and a decision had. Sec. 19. The suit thus prohibited is a suit brought by the person taxed, to recover back a tax illegally assessed and collected. This is different from the case now under consideration, which is a suit brought by the Government for collecting the tax, and the person taxed (together with his sureties) is defendant instead of plaintiff. No statute is cited to show that he cannot, when thus sued, set up the defense that the tax was illegally assessed, although he may not have appealed to the commissioner.

"Is he precluded by any general rule of law from setting up such a defense? Has an assessment of a tax so far the force and effect of a judicial sentence that it cannot be attacked collaterally, but only by some direct proceeding, such as an appeal or certiorari, for setting it aside?

"It is undoubtedly true that the decisions of an assessor or Board of Assessors, like those of all other administrative commisioners, are of a *quasi* judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property or operations not taxable, such assessment is illegal and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the Government elects to resort to the aid of the courts it must abide by the legality of the tax."

*Elmore B. Clinkenbeard, et al. v. United States,* 21 Wall., 65-71, 22 L. Ed. 477.

The rule, according to opposing counsel, is that "*where an administrative body is given jurisdiction,* its jurisdiction must be exhausted before that of the courts may be invoked" (Emphasis added) (Comm. 18). Here the question is whether it was given jurisdiction by the Act.

It is not necessary to discuss any of the numerous decisions cited by Commission counsel in connection with the first division

of their argument, entitled "The Commission order was within its authority" (Comm.-Summary 9-10, Argument 11-21). Insofar as counsel discuss any of such decisions, their quotations therefrom are fragmentary and lifted from the context. They also ignore the settled rule that expressions in the opinion of a court must be considered and applied in connection with and as qualified by the facts and the law involved in the case in which such expressions were used. *Epstein v. United States,* 174 F (2d) 755, 767 (C. A. 6). Furthermore, counsel fail to enlighten this Court as to the facts, the issues or the provisions of the governing statutes involved in any of the decisions cited by them.

As a matter of fact, none of the decisions upon which they rely are pertinent in this case, for the reason, as pointed out in *Federal Power Comm. v. Panhandle Eastern Pipe Line Company, supra,* the general propositions, which it is said such decisions establish or support, are not in issue herein.

A. The broad assertion, not demonstrated to be the fact, that "The terms of the statute plainly authorize such an order" as the Opinion-Order of March 31, 1950 (Comm. 9, 11-16), is not responsive in any way to the question here involved whether the Commission has authority under the Federal Power Act to issue and serve, by mail or otherwise, original process wherein the cited respondent is commanded to respond and appear before the Commission. Such authority, far from being "clear from the provisions of the Act", cannot be found in the Act at all. This counsel admit, in effect, for they devote many pages to conjure up such authority by resort to Section 307 ("Investigations by Commission"), to Section 308 ("Hearings, Rules of Procedure"), and to Section 309 ("Administrative Powers of Commission; Rules, Regulations and Orders"), all of which are administrative; and to Section 203 (Dispositions of Property; Consolidations; Purchase of Securities") and Section 301 ("Accounts, Records and Memoranda") which are regulatory. None of the foregoing sec-

tions can invest the Commission with plenary authority or create powers "on the basis of inherent necessity". None of the decisions relied upon by counsel so hold.

B. Counsel's contention that "Numerous court decisions on review of similar Commission orders confirm the Commission authority" (Comm. 9, 16-17) proves nothing, for they admit that in all the decisions cited ". . . . . the parties involved had, in fact, appeared and participated in the Commission proceedings . . . . ." (Comm. 18). Counsel simply beg the question at issue by the citation of such irrelevant decisions.

C. The contention that "The Commission's authority was not dependent upon the Company's appearance or participation in the Commission proceedings" (Comm. 17-21), is bolstered by citations said to support the proposition that "In case after case that rule ('primary jurisdiction') has been applied to prevent efforts to invoke court jurisdiction without first exhausting administrative remedies" (Comm. 10). The so-called primary jurisdiction rule is not involved in the case at bar. Arizona Edison has not attempted at any time to invoke court jurisdictian to interfere with or stop the Commission in the discharge of its duties. On the other hand, it is the Commission which is seeking judicial assistance to enforce its order, "and thus forces the issue upon the courts". *Border Pipe Line Co. v. Federal Power Comm.,* 171 F (2d) 149 (C. A. D. C., 1948).

## II

**The Commission is Without Subject Matter Jurisdiction to Enter a Valid Enforceable Order Finding Arizona Edison to be a "Public Utility" as Defined in the Federal Power Act or to Order the Company to Comply with Any of the Regulatory Provisions of That Act, All of Which Are Applicable Only to a "Public Utility".**

Briefly stated, the facts so far as here relevant and as appearing in the Commission Opinion-Order of March 31, 1950, are:

All property and facilities owned or operated by Arizona Edison, an Arizona corporation, are situate in central and southern Arizona; all its business operations are conducted solely in that State; all customers and consumers of electric energy served by the Company are within the boundaries of that State; all such customers and consumers are ultimate consumers; all facilities owned or operated by the Company serve only and exclusively Arizona consumers; and none of such facilities have any other possible purpose, function, use or utility. The Company owns no lines crossing the Arizona boundary and does not connect with any facilities of others at the boundary (R. 15, 19, 20, 21-23).

Arizona Edison purchases electric energy generated outside of Arizona, to-wit: in Nevada and California, by the Bureau of Reclamation, an agency of the United States Government; such electric energy is brought into central or southern Arizona over the facilities of the Bureau; such purchases of electric energy and the deliveries thereof are made into three of Arizona Edison's local systems, namely, the Maricopa, Coolidge-Florence, and Yuma Systems, by the Bureau of Reclamation or the United States Indian Service, also a federal agency, which receives electric energy from the Bureau; the Bureau sells and makes distribution in Arizona of electric energy from its said facilities to others than Arizona Edison. All deliveries to Arizona Edison are made from transformer stations of the delivering federal agencies after the voltage of the energy has been stepped down and reduced, except the energy, if any, received by the Company from the Bureau's Siphon Drop generating plant in California, which is mingled with the Bureau energy from Parker Dam before any delivery of energy is made by the Bureau to Arizona Edison's Yuma System (R. 19, 20-23).

Upon delivery of electric energy by the Bureau to Arizona Edison's three local systems, all such energy is sold and delivered

to and consumed by only ultimate consumers in the system service area of the repective and separate local systems of Arizona Edison (R. 19-23).

On the basis of the foregoing "findings", the Commission made the following "Conclusions" (R. 96-97): "Arizona Edison as an established course of business transmits electric energy in interstate commerce over the facilities . . . . ." *of the three local systems above referred to*; "Arizona Edison owns and operates facilities for the transmission of electric energy in interstate commerce which is transmitted from the state in which it is generated and consumed at points outside thereof, which facilities are in addition to and do not include facilities . . . . . used in local distribution or only for the transmission of electric energy in intrastate commerce . . . . ."; and "Arizona Edison owns and operates facilities subject to the jurisdiction of the Commission under Part II of the Federal Power Act within the meaning of Section 201(e) of the Act and is therefore a 'public utility' within the meaning of the Act . . . . ." (R. 34-35).

It is wholly immaterial what "findings" and "conclusions" of jurisdiction the Commission may make, unless the jurisdictional status essential to the exercise of any regulatory authority whatever by that body exists in fact and in law. The Commission's authority is conditioned upon and by the express congressional grant of jurisdiction, subject to the specific limitations and exceptions carved out of such grant of authority.[5] Apparently, in its Opinion-Order herein, the Commission recognized that it must establish its jurisdiction in this case, if any, under Section 201 of the Act (R. 26-27). Yet, its complaint in this action contained no allegations, even by way of conclusion, that Arizona Edison was a "public utility" under the Act (R. 3, *et seq*). That fact and the refusal of the Commission, at any time herein, to meet the issue of subject matter jurisdiction appear consistent only with the contention that the Commission in the administration of the

[5] *Federal Power Comm. vs. Panhandle Eastern Pipe Line Co., supra*, at page 59 of 172 (2d); *Connecticut L. & P. Co. v. Fed. Power Comm., infra.*

Act has plenary authority; and that even if its proceedings and orders are in excess of its statutory authority, the same are merely wrong and not invalid and void. Such appears to be the Commission's present position (Comm. 26, Note 32, 23-32), which will be covered fully in the next division of this argument.

Our present discussion will be addressed only to the proposition that unless the jurisdictional tests prescribed in Section 201 of the Act are satisfied, the Commission is without authority and any order it may make is utterly null and void, irrespective of what "conclusions" it may have indulged.

Section 201 of the Act is not complicated. The provisions thereof are stated in non-technical language of common understanding. So far as here applicable, they are:

> "The povisions of this Part shall apply to the transmission of electric energy in interstate commerce . . . . ."
>
> "The Commission shall have jurisdiction over all facilities for such transmission . . . . ."
>
> "The Commission . . . . . shall not have jurisdiction . . . . . over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce . . . . ."
>
> ". . . . . electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof . . . . ."
>
> ". . . . . 'public utility' . . . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part."
>
> "No provision of this Part shall apply to, or be deemed to include the United States . . . . . or any agency, authority or instrumentality" thereof.
>
> ". . . . . such Federal regulation, however to extend only to those matters which are not subject to regulation by the States."

The judicial questions thus presented are: First, whether any of the local system facilities owned or operated by Arizona Edison

involved in this case are "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce", and second, whether in any event such local system facilities are "facilities for the transmission of electric energy in interstate commerce.".

It is to be observed that the term "facilities" in the statutory phrase "facilities used in local distribution" is one of considerable generality.[6] There is no differentiation, expressed or implied, in the statutory language between so-called "transmission" facilities and so-called "distribution" facilities. Yet, it will be observed that the Commission makes such distinction, *within* each of the Company's three local systems, on the basis of the distance from point of local system receipt to point of first customer delivery at the same or a further reduced voltage (R. 20-23), which it elects to describe as "transmission in bulk" (R. 26-27).[7] Presumably, from the point of first customer delivery, the "facilities" are "used in local distribution". But the fact remains that all such lines, both prior to and after first customer delivery, however described by the Commission, actually are "facilities used in local distribution", according to the common understanding of the operations involved and the statutory phraseology. If, as declared by the Commission, they are, prior to first customer delivery, "transmission" lines, then they are excluded from Commission jurisdiction as "facilities . . . . . only for the transmission of electric energy in intrastate commerce". It is to be noted that the entire phrase is unitary and constitutes a single concept, to-wit: "facilities used in local distribution or only for transmission . . . . . in intrastate commerce".

The beginning of "local distribution", under the Commission theory, must mean the ultimate consumer's service line from the street or alley next to his home or place of business, for "transmis-

[6] *Fed. Power Comm. v. Panhandle Eastern Pipe Line Co.*, at page 59 of 172 F (2d); *Connecticut L. & P. Co. v. Fed. Power Comm., infra.*

[7] See *Application of Kansas Gas & Electric Co.* (F.P.C. Opinion 34, 1938), 1 F.P.C. Rep. 536, 26 P.U.R. (NS) 259, 266, wherein the Commission concluded that there was nothing in the Act or its legislative history to indicate that Congress intended to draw any nice distinction between transmission and distribution lines.

sion" or conveyance "in bulk" continues until each individual customer is served from the common pool of electric energy. Until each of such customer deliveries is made the electric energy in the line continues to be conveyed and "in bulk". Moreover, according to the Commission, "transmission . . . . . in interstate commerce" covers electric energy "conveyed across state lines whether the conveyance be by so-called transmission facilities or by distribution facilities."[8] The further one pursues the Commission theories as to when so-called "transmission in bulk" within a local system becomes "distribution", the more apparent it becomes that the background, the history and the terms of the Act, physical laws and just ordinary sense all are ignored and cast aside.

But the Commission has had and does have ample and authoritative mandates by which to chart its course; first, the unambiguous jurisdictional tests of Section 201 of the Act, and second, the construction and application of the terms and provisions thereof by the Supreme Court, together with the Court's directions in that behalf to the Commission. The Commission, however, in this case, and in other cases as well, has refused to follow either mandate.

Accordingly, we now invite the attention of the Court to *Connecticut Light and Power Co. v. Fed. Power Comm., infra,* from the opinion in which case rather extensive quotations will be made because all of the Commission arguments are disposed of therein. The opinion of the Court delivered by Mr. Justice Jackson, and concurred in by all Justices except Justices Murphy, Black and Reed, declared, *inter alia,* as follows:

> "The Federal Power Commission has asserted jurisdiction to regulate the accounting practices of the Connecticut Light and Power Company.
>
> . . . . . .
>
> "The Company, incorporated by Connecticut, serving customers only in Connecticut and owning no utilities property outside of that state, is comprehensively regulated by the Con-

[8] *Application of Kansas Gas & Electric Co., supra.*

necticut Public Utilities Commission in accounting practices as in many other matters, and it challenges the jurisdiction of the Federal Power Commission.

. . . . . .

"The only presently existing facilities said to confer jurisdiction are at Bristol. Here the petitioning company purchases energy from the Connecticut Power Company, which despite a confusing similarity of name is an entirely separate and unaffiliated concern. *The petitioning company receives power at 66,000 volts from the lines of the Connecticut Power Company over a short tap line, owned by the Connecticut Power Company, which leads to petitioner's substation. There the energy is stepped down to 4,600 and 13,800 volts and transmitted thence over many circuits to consumers in and around Bristol.*[9] The substation includes all of the usual equipment, lightning arrestors, disconnects, oil circuit breakers, busses, stepdown transformers, and appurtenant structures of an outdoor substation; and in the substation building a synchronous condenser is owned and operated, as required by the supply contract, to maintain the power factor.

. . . . . .

"It is not denied, although the Commission's findings and opinion makes no mention of the fact and appear to have given it no weight, that the predominant characteristic of the company's over-all operation is that of a local and intrastate service. It serves one hundred seven towns, cities, and boroughs of Connecticut with a total population of about 660,000 and in addition supplies substantially all the power used by local companies which serve communities of Connecticut having a population of 130,000. It owns no lines crossing the Connecticut boundary and does not connect with any other company at the boundary. *It has no business other than Connecticut service for which it needs any facilities whatever, and if local distribution service were terminated, no remaining purpose or use of*

[9] Mr. Justice Jackson, who delivered the opinion of the Supreme Court in the *Connecticut* case, in his dissent in *Fed. Power Comm. v. East Ohio Gas Co., infra,* restated precisely what the holding in the *Connecticut* case was:

"It is decidedly consistent with our recent declaration under the almost identical words of a similar Act that limitation of local facilities was not to be found in the East Ohio tax formula, and that even the transmission lines of a statewide system supplying electric power to consumers in over a hundred communities are facilities used in local distribution. Connecticut Light & Power Co. v. Federal Power Comm., *supra.*"

*any kind is suggested for the facilities in question.* Its purchases and sales, its receipts and deliveries of power, are all within the state. Its rates and its fiscal and accounting affairs are fully and so far as appears effectively regulated by the State of Connecticut.

. . . . . .

"The first question is whether the reviewing court acted under a misapprehension as to the meaning of the statute.

"The jurisdictional and regulatory provisions of the Federal Power Act apply only to 'public utilities', and the Act provides that by 'public utilities' it 'means any person who owns or operates facilities subject to the jurisdiction of the Commission.' § 201(e), 49 Stat. 848. These facilities are carefully defined. 'The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.' § 201(b). Transmission and sale as used in this provision are further defined to mean respectively 'transmission of electric energy in interstate commerce' and 'sale of electric energy at wholesale in interstate commerce.' And the Act goes on to say: 'electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof' and that sale of electric energy at wholesale means 'a sale of electric energy to any person for resale.' §§ 201(c), (d). Of course as preamble to all of these provisions stands the policy declaration that Federal regulation 'of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.' § 201(a).

. . . . . .

"The policy declaration that federal regulation is 'to extend only to those matters which are not subject to regulation by the

States' is one of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose. But such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent. It cannot be wholly ignored.

. . . . . .

"The assurance which the sponsors of this legislation expressed as to protection of the general jurisdiction of a state over electric utilities of this character either is not given effect by this Act at all, or it is to be found in the words of § 201(b), 'but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, . . . . . over facilities used in local distribution . . . . .'

"It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.' The command 'thou shall not' is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense. If otherwise in doubt this provision should be read in harmony with the policy provision. So read its terms seem plainly to state circumstances under which the Commission shall not have jurisdiction. As such it is the provision which loomed importantly in the minds and speech of its sponsors, perhaps was necessary to get the bill passed, and is one which the Commission must observe and the courts must enforce.

. . . . . .

"But whatever reason or combination of reasons led Congress to put the provision in the Act, we think it meant what is said by the words 'but shall not have jurisdiction, except as specifically provided in this Part or the Part next following . . . . . over facilities used in local distribution.' Congress by these terms plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry. To define the scope of state controls, Congress employed terms of limitation perhaps less scientific, less precise, less definite than the terms of the grant of federal power. *The expresion 'facilities used for local distribution' is*

*one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.*

"Nor do we think the exemption of 'facilities used for local distribution' exempts only those which do not carry any trace of out-of-state energy. Congress has said without qualification that the Commission shall not, unless specifically authorized elsewhere in the Act, have jurisdiction 'over facilities used in local distribution.' To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control. *It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state energy and still be exempt under the Act.* The test is whether they are local distribution facilities. There is no specific provision for federal jurisdiction over accounting except as to 'public utilities'. The order must stand or fall on whether this company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution.

. . . . . .

"Whether the Commission's decision was reached under the same misapprehension of the law of its jurisdiction is not made so clear from its findings or opinion. Of course under the Act 'The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.' § 313(b). The Commission has found that each of the facilities in question is 'used for the transmission of electric energy purchased as aforesaid from the Connecticut Power Company, as distinguished from local distribution thereof.' *It has not, however, made an explicit finding that these facilities are not used in local distribution and we are in doubt whether by application of the statute as herein construed it could have done so.* We have said, and it is applicable to this case, that 'Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear

affirmatively and not rest on inference alone.' Yonkers v. United States, 320 U. S. 685, 692; Florida v. United States, 282 U. S. 194, 211-12; cf. Palmer v. Massachusetts, 308 U. S. 79, 84; Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 351. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped.

"*The findings and opinion of the Commission leave us in doubt, to say the least, as to whether what we consider limitations on the jurisdiction of the Commission were so considered by it.* The only specific reference to the subject is the statement that 'Respondent's contentions that it is subject to regulation by the Public Utilities Commission of the State of Connecticut and therefore not subject to the regulation provided by the Federal Power Act must be rejected,' . . . . . But such a rejection of state control as grounds of exemption must be preceded by the finding, giving due weight to the policy declaration in doubtful cases, that the company in question is a 'public utility' by reason of ownership of facilities not used in local distribution.

"In determining this the Commission announced and applied a rule which appears to be one of law as to interstate transmission: 'Such transmission, in our opinion, extends from the generator, where generation is complete (citing Utah Power & Light Co. v. Pfost, 286 U. S. 165, 181) to the point where the function of conveyance in bulk over a distance, which is the essential characteristic of 'transmission', is completed and the process of subdividing the energy to serve ultimate consumers, which is the characteristic of 'local distribution', is begun (citing Southern Gas Corporation v. Alabama, 301 U. S. 148, 155, and East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 471).

". . . . . In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution, the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, the Commission has misread the decisions of this Court. No such rule of law has been laid down.

*"But for such an erroneous view of the law established by our decisions it seems doubtful if the Commission would have reached the conclusion that it did upon this record. Nor is it clear that if it were reached it would be supported by substantial evidence.*

. . . . . .

"For the reasons stated, the judgment of the Court of Appeals is reversed with instructions to remand the cause to the Federal Power Commission for further proceedings consistent with this opinion." (Emphasis added).

*Connecticut Light and Power Co. v. Fed. Power Comm.* (1945), 324 U. S. 515, 89 L. Ed. 1150, 65 S. C. 749.

To one informed of no facts apart from the text of the Act, and particularly the jurisdictional provisions of Section 201 thereof, and the careful and emphatic opinion and judgment of the Supreme Court in the *Connecticut* case declaring the purpose, meaning and content of that Section, it would appear to be conclusive that Arizona Edison neither owned nor operated "facilities subject to the jurisdiction of the Commission."

But the chronology of the Commission attitude and action from and after the mandate addressed to it by the Supreme Court in the *Connecticut* case, discloses that the Commission has ignored and disregarded that mandate.[10] It was in 1947, more than two years after the Connecticut decision, that the Commission finally took action on the mandate. On May 29, 1947, the Commission issued its "Findings and Order" in "Proceedings on Remand", 6 F.P.C. Rep. 104-111. The "findings", briefly stated, were: 1. "On

10 See as illustrative: In the matter of *Florida Public Utilities Company,* Opinion 189, January 25, 1950, Docket No. E-6136 (not yet published in reports), wherein the *Connecticut* case was brushed aside by a cursory but inaccurate reference to the opinion in that case; *In the Matter of Western Light and Telephone Co., Inc.,* Opinion No. 199, September 20, 1950, Docket No. E-6279 (not yet published in reports) wherein the Commission found that a "public utility" status under the Act "seems to depend on whether the source of all or a substantial part of the energy it would receive . . . . . is outside the State" and "it is impossible to conclude that out-of-state energy would not be supplied to Western by the proposed interconnection . . . . .", the system of Western and such interconnection both being wholly in Kansas. Naturally, no reference is made to the *Connecticut* case.

the basis of our review of the record in the light of the opinion of the Supreme Court, it is extremely doubtful that the necessary finding can now properly be made;" 2. "The Company is now about to remove any remaining shadow of doubt as to its status by cutting its last remaining connection with out-of-state power at its Bristol substation"; and 3. An extensive opinion construing and disagreeing with the opinion of the Supreme Court. Thereupon, since "the public interest" would not be served, the proceedings were terminated.

There is most serious doubt, also, under the decision in the *Connecticut* case, (apart from the indisputable fact that *all* "facilities" of Arizona Edison are "facilities used in local distribution or only for the transmission . . . . . in intrastate commerce" over which the Commission "shall not have jurisdiction"), whether Arizona Edison owns or operates any facilities whatever "for transmission . . . . . in interstate commerce". The Court will note the statement of counsel (Comm. 11-12), that "as originally drafted, the bill which later became the Federal Power Act would have regulated every electric utility whose facilities . . . . . interconnected with facilities crossing state boundaries, but the definition of 'public utility' finally adopted . . . . . was more technical". Yet, if the Commission is sound in its contention in this case, the same result is reached by statutory construction, despite the fact that Congress struck from the bill the proposed Commission jurisdiction arising from the interconnection of intrastate facilities with other facilities crossing state boundaries.[11] Such is not the law. *Western Union Telegraph Co. v. Lenroot,* 323 U. S. 490, 508, 509; 89 L. Ed. 414, 426, 427; 65 S. C. 335.

As hereinbefore noted, Section 201(f) of the Act provides that "*no provision of this Part* shall apply to, or be deemed to include the United States or any agency thereof." Consequently, Section

[11] The relevant language of the proposed bill was: "The Commission shall have jurisdiction over all facilities for such transmission", in interstate commerce . . . . "and over all facilities connected therewith as parts of an interconnected system of power transmission situated in more than one state . . . ." H. R. 5423, 74th Cong., 1st Sess., February 6, 1935; S. 1725, 74th Cong., 1st Sess., February 6, 1935.

201(c) defining interstate commerce has no application to any federal agency, such as the Bureau of Reclamation or the Indian Service. A federal agency is not engaged in interstate commerce under the Act.

We next consider whether or not the acts of transmission and sale of energy to Arizona Edison by an agency of the United States constitute commerce at all. If these acts are not engagements in commerce by the government, it follows that the commerce commences at the point of receipt of the energy by Arizona Edison in the State of Arizona and perforce must be intrastate in character.

The Federal Constitution (Clause 3, Section 8, Article I) grants to the Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Constitution does not purport to authorize the Federal Government to engage in commerce, as such.

The point is clearly stated by Circuit Judge Sibley, presiding over a three-judge court in the Northern District of Georgia, in the case of *Georgia Power Company v. Tennessee Valley Authority,* 14 F. Supp. 673, 676, as follows:

> "The great question which now presses for decision is whether TVA is so clearly without statutory or constitutional authority to do what it is about to do in Georgia as that it should be halted in its tracks. There has been some argument that interstate transmission of electricity is interstate commerce, but its local distribution is domestic commerce, but I think the matter immaterial. The federal power over interstate commerce is to regulate it, not to engage in it. TVA gets no help from that source. Its activities in selling electric power as pointed out in Ashwander et al v. Tennessee Valley Authority, 56 S. Ct. 466, 80 L. Ed.—, rest on the constitutional right of the United States to dispose of their property."

In a recent Opinion-Order No. 216, July 19, 1951, Docket Nos. E-1246 and E-1477, *In the Matter of Texas Illinois Natural Gas Pipeline Company,* the Federal Power Commission took occa-

sion to point out that the decision of the Supreme Court in *Federal Power Comm. v. East Ohio Gas Co.,* (1950) 338 U. S. 464, 70 S. C. 266, 94 L. Ed. 268, was an unfortunate one. Strangely enough, the Commission for years had battled strenuously and with great zeal to secure the precise decision rendered by the Supreme Court in that case. Little more than a year later, the Commission declared in its above cited Opinion-Order "It is appropriate, however, to add that we perceive no useful purpose to be served by the exercise of federal regulatory authority in a situation such as this", i.e. involving dual control, under State and Federal regulation, as to certificates of public convenience and accounting matters. "We, therefore, take this occasion to express the hope that the Congress may see fit to enact remedial legislation covering such situations where Federal regulatory jurisdiction serves no important public purpose. . . . . This would create no 'regulatory gap' but would relieve the subject companies and the rate prayers whom they serve, as well as this Commission, of needless administrative detail and burdensome expense."

The jurisdiction sought to be asserted herein over facilities of Arizona Edison, creating as it would dual control by the State of Arizona and the Commission, could serve "no useful purpose" and would operate merely to create "needless administrative detail and burdensome expense."

Under such circumstances, it seems incongruous that the Commission is using its own time and the time of the Courts, as well as imposing additional expense on both taxpayers and ratepayers, in the attempt in this case to establish a technical Federal regulatory authority which the Commission, under like circumstances, has admitted is not in the public interest.

## III

**It is the Duty of the District Court in an Enforcement Action Under Section 317 of the Act, and of This Court on Review of the Judgment of the District Court in Such Enforcement Action, to Examine Into and De-**

**termine the Jurisdiction of the Commission to Enter the Order Sought to be Enforced and the Jurisdiction of the District Court to Enforce the Order in Suit.**

Any intelligent appraisal and determination of the issue above stated requires prior attention to the terms of Sections 314 and 317 of the Act.

Section 314 of the Act entitled "Enforcement of Act, Rules and Regulations", provides:

> ". . . . . the Commission . . . . . may in its discretion bring an action in the proper District Court . . . . . to enjoin" violations "and to enforce compliance with the Act. . . . .
>
> ". . . . . and upon a proper showing a permanent or temporary injuction or restraining order shall be granted . . . . .
>
> "Upon application of the Commission, the district courts . . . . . shall have jurisdiction to issue writs of mandamus commanding any person to comply with the Act. . . . ."

It is Section 317, entitled "Jurisdiction of Offenses; Enforcement of Liabilities and Duties" wherein the Act vests "exclusive jurisdiction of violations" in the "District Courts" and specifies the manner of the exercise of such jurisdiction. That Section provides:

> "The District Courts of the United States . . . . . shall have exclusive jurisdiction of violations of this Act or the rules, regulations and orders thereunder . . . . .
>
> "The District Courts shall have exclusive jurisdiction . . . . . of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this Act or any rule, regulation or order thereunder.
>
> "Judgments and decrees so rendered shall be subject to review as provided in . . . . . the Judicial Code". (28 U.S.C. 1291).

Commission counsel in their brief under the heading "The Commission's order may not be re-examined in a District Court pro-

ceeding for its enforcement" (Comm. 21-32), completely ignore both Section 314 and Section 317. The reason is obvious. Their entire argument simply fades away in the face of the specific provisions of these two Sections.

By the terms of Sections 314 and 317 "District Courts" are vested with "exclusive jurisdiction"; their orders and decrees are to be entered only "upon a proper showing"; and the judgments and decrees so rendered "shall be subject to review . . . . ."

The judicial authority thus affirmatively and expressly delegated is plenary, and attended with a broad discretion both in equity and at law. The review provided by Section 317 is of judicial judgments and decrees. If the authority of the District Courts were purely administrative, as contended by Commission counsel, there would be no reason whatever to incorporate review into the terms of Section 317. If the enforcement court were under mandate simply to enter whatever judgments and decrees of enforcement the Commission might make application for, there would be no discretion and nothing for the Court of Appeals to review. Under the Commission concept, mandamus would be the proper and sole procedure to compel enforcement should the enforcement court refuse to enforce.

> "In this situation, does a registrant have the unqualified right to withdraw his registration statement or, in other words, to dismiss a pending proceeding by which, for his own advantage, he is seeking the use of the mails and the instrumentalities of interstate commerce? If he have such right, there is no basis for the exercise of discretion in respect of the matter on the part of the commission; for it is obvious that discretion does not exist where there is no power to act except in one way. Cf. City of Detroit v. Detroit City Ry Co. (C.C.) 55 F. 569, 573, Ex parte Skinner & Eddy Corp., 265 U. S. 86, 93, 44 S. Ct. 446, 68 L. Ed. 912."

*Jones v. Securities and Exchange Commission,* 298 U. S. 1, 18, 56 S.C. 654, 659, 80 L. Ed. 1015.

Commission counsel simply dispose of Sections 314 and 317 by silence, although, as was necessary, the complaint alleged (R. 3) "This action arises under Sections 314(a), 314(b) and 317 of the Federal Power Act. . . . . ." This review concededly is under authority of Section 317. The Commission's whole position is self-contradicting.

It being necessary to rely on statutory authority, counsel (Comm. 19-21) resort to Section 313 of the Act, entitled "Rehearings; Court Review of Orders". It matters not, to them, that this is not a "review" but an enforcement proceeding. The ultimate argument really advanced is that (Comm. 22) the Court of Appeals "shall have exclusive jurisdiction to affirm, modify or set aside", without limitation. Anything less does not serve their purpose. But Section 313(b) does not vest any such broad jurisdiction in the Court of Appeals. If it did, then Section 313(b) and Section 317 would be in direct conflict. The Court of Appeals can acquire exclusive jurisdiction of the statutory review only if a petition for review is filed and served on the Commission, which is expressly directed to certify and file with the court a transcript of the record. Then *"upon the filing of such transcript such court shall have exclusive jurisdiction* to affirm, set aside or modify. . . . . ." Unless the statutory review is undertaken by "any party . . . . . aggrieved" by a Commission order, the Court of Appeals is vested with no jurisdiction whatever. There is no conflict between Section 313 and Sections 314 and 317. As a matter of fact, an enforcement proceeding need not await the expiration of the time limits imposed by Section 313(a) and (b), to which counsel refer (Comm. 23). An enforcement proceeding under Section 314 may be brought *whenever* the Commission in its discretion elects so to do. See *Ford Motor Co. v. National Labor Relations Board,* 305 U. S. 364, 59 S. C. 301, 82 L. Ed. 221.

While Congress has the constitutional authority to withhold jurisdiction, in whole or in part, from the District Court or the Court of Appeals and, under certain circumstances, to deny to a

person a judicial forum in which to have his rights adjudicated, this is not such a case. Here the controlling Federal Power Act by its express terms vests in the District Court "exclusive jurisdiction over violations . . . . . and of all suits in equity and actions at law brought to enforce . . . . ." There is no slightest statutory foundation for the contention that the powers of the District Court as a court of equity or as a court of law are in any manner or in any respect curtailed. Nor is judicial authority to be found which supports the Commission's contention here. On the other hand, there are numerous decisions holding to the contrary. The decisions from which "spot quotes" are made in the Commission brief do not support its contention now under consideration. Such decisions will be discussed hereinafter.

The District Court in an enforcement proceeding has the power, and it is its duty, to determine whether the Commission order is valid, for if not, there is no order to be enforced. A void order is no order for any purpose. The Court itself has no authority by its decree, to infuse validity into an invalid order. The order, to be enforceable, must have been valid when issued.

*Fed Power Comm. v. Metropolitan Edison Co.,* 304 U. S. 375, 386-387, 82 L. Ed. 1408, 1415, 58 S. C. 963

*Fed. Power Comm. v. Panhandle Eastern Pipe Line Co.,* 172 F (2d) 57, 60 (C.A. 3, 1949)

*Fed. Power Comm. v. Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 515, 93 L. Ed. 1499, 1510, 69 S. C. 1251

*East Ohio Gas Co. v. Fed. Power Comm.,* 115 F (2d) 385, 387 (C.A. 6, 1940)

*United Gas Pipe Line Co. v. Fed. Power Comm.,* 181 F (2d) 796, 800 (C. A. D. C. 1950)

*Fed. Power Comm. v. Hope Natural Gas Co.,* 320 U. S. 591, 64 S. C. 281; 88 L. Ed. 333

The foregoing decisions relate to the Federal Power Act and to the Natural Gas Act. The enforcement provisions, and the provisions for statutory review, in the two Acts are identical. As to each

of the Acts, the courts declare that the issue of Commission jurisdiction can be raised and adjudicated in an enforcement proceeding.

There are several decisions upholding the authority of the enforcement court to inquire into the jurisdiction of the National Labor Relations Board. The enforcement and review provisions of the National Labor Relations Act are, in substance, identical with those in the Power Act and Natural Gas Act, except that under the Labor Act the Court of Appeals is the enforcement court (Sec. 10 e), as well as the court of review (Sec. 10 f).

*National Labor Relations Board v. Cheney California Lumber Co.,* 327 U. S. 385, 66 S. C. 553, 90 L. Ed. 739

*National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 331 U. S. 416, 67 S. C. 1274, 91 L. Ed. 1575

*National Labor Relations Board v. Red Spot Electric Co.,* (C. A. 9, June 20, 1951, No. 12,804)

*National Labor Relations Board v. Boss Mfg. Co.,* 107 F. (2d) 574, 578, 579 (C. A. 7, 1939)

*Ford Motor Co. v. National Labor Relations Board,* 305 U.S. 364, 59 S. C. 301, 83 L. Ed. 221

*National Labor Relations Board v. Highland Park Mfg. Co.,* (1951) 341 U. S. ...., 71 S. C. 758, 95 L. Ed. 680

In *Hecht Co. v. Bowles,* 321 U. S. 321, 64 S. C. 587, 88 L. Ed. 754, the Supreme Court had before it the question of whether the enforcement provisions of the Emergency Price Control Act required the enforcement court to issue its injunction or other appropriate order as a matter of course. The contention of the Price Administrator was that Section 205(a) of that Act was mandatory upon the enforcement court because, upon a showing by the Administrator of violation, the statutory language is that the enforcement order *"shall be granted."* The Court rejected the contention and held "a grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended

to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

The recent decision of this Court in *National Labor Relations Board v. Red Spot Electric Co., supra,* is decisive here. In that case the company did not avail itself of the statutory review and did not appear in the enforcement proceeding before this Court. The opinions of this Court in that case are direct and specific that it, the enforcement court, is *not* "imperatively compelled to order enforcement summarily. There is no language in the enactment which points to the conclusion so desired. The whole structure of the law demands judicial consideration when an order of enforcement is prayed. If mechanical sanctions were required, these could have been provided without the necessity of appeal to the courts . . . . . The postulates of jurisdiction of the Board and of the Court itself must be examined without fail." And "Upon a petition of this kind, we should carefully examine the record for the purpose of determining that the Board had jurisdiction to make its order and that it has not 'traveled outside the orbit of its authority' ".

We do not deem it necessary to quote extensively from the many decisions, *supra,* which reject the contention of the Commission that the enforcement court is in effect a mere mechanical rubber stamp.

*Fed. Power Comm. v. Panhandle Eastern Pipe Line Co., supra,* was an enforcement proceeding. Judicial enforcement was denied in the District Court, in the Court of Appeals, and in the Supreme Court. The order of the Commission undertook to assert a jurisdiction which it does not possess and is prohibited from exercising, hence was invalid and void. Mr. Justice Reed, speaking for the Supreme Court, declared:

> "The Commission sought by injunction to enforce its order halting the transaction between Panhandle and Hugoton pending the outcome of its investigation. The Commission argues

that at any rate the transfer should be enjoined until it can determine its own power and the necessity of using it. Injunctive aid was requested under § 20(a) of the Act and the general equity power of the district court. To be entitled to judicial assistance, however, the order issued by the Commission must be valid and based on a statutory grant of power to the Commission. As we have held above that the transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act, the authority of the Commission cannot reach the sales. A proposed transfer cannot be stopped by the Commission. It should not be permitted to delay what it cannot prevent . . . . ."

The same principle was restated in *National Labor Relations Board v. Highland Park Mfg. Co., supra,* also an enforcement proceeding. Judicial enforcement was denied by the Court of Appeals and by the Supreme Court. Section 159(h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 29 U.S.C.A. 159(h), provides: "No investigation shall be made by the Board . . . . ., no petition under subsection (e)(1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge by a labor organization . . . . . unless there is on file with Board . . . . ." the so-called non-Communist affidavit required by the Act to be filed. The necessary affidavit had not been filed, as required. Mr. Justice Jackson, speaking for the Supreme Court, disposed of the case, as follows:

"It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

*National Labor Relations Board v. Jones & Laughlin Steel Corp., supra,* was another enforcement proceeding. It is clear from the context of the Supreme Court opinion and the opinion of the Court of Appeals (146 F (2d) 718) that the respondent company did not seek to avail itself of the statutory review. The question involved was whether the Board order had become moot. In that connection the Court, speaking through Mr. Justice Murphy, declared:

> ". . . . . The order was a continuing command which may be effectuated in the future. *But unless the order was valid when it was issued, there is no basis whatever for it and no court can decree its enforcement in the future.* Hence its validity must be judged as of the time when it was issued, a time when the guards were still militarized. This is not to say, however, that events subsequent to demilitarization are irrelevant in deciding whether the order should be enforced. All that we hold is that demilitarization in and of itself is not enough to render the order or the case moot." (Emphasis added).

In *Ford Motor Co. v. National Labor Relations Board, supra,* the Board sought enforcement of its order and thereafter the company petitioned for the statutory review. On such state of facts, Mr. Chief Justice Hughes, who delivered the opinion of the Court, declared:

> *"Under Section 10(f), 29 U. S. C. A. Sec. 160(f), the jurisdiction of the Circuit Court of Appeals is of the same character and scope in a proceeding for review brought by a person aggrieved by an order of the Board as the jurisdiction which the court has in a proceeding instituted by the Board for enforcement.*
>
> "While Section 10(f) assures to any aggrieved person *opportunity* to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. *Where the Board has petitioned for enforcement under Section 10(e) and the jurisdiction of the court has attached, no separate proceeding is needed on the part of the person thus brought into the court. . . . . .*

"While in the instant case there art two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned. Petitioner's answer in the Board's proceeding presented substantially the same objections as those raised in petitioner's proceeding for review. The present contentions of the parties are largely addressed to procedural distinctions, but if we follow the course of the two proceedings we find that there is really but one ultimate question and that is with respect to the court's final action in remanding the cause to the Board for further proceedings." (Emphasis added)

In *Fed. Power Comm. v. Metropolitan Edison Co., supra,* Mr. Chief Justice Hughes, speaking for a unanimous court (two Justices not participating), used the following significant language in answer to the contention herein made that the statutory review under Section 313 of the Federal Power Act is exclusive:

"There was no order of the Commission before the Circuit Court of Appeals for review. *Apart from the question whether the order of January 6, 1936, or that of January 26, 1937, can be regarded as reviewable, no application for such a review had been made.*

. . . . . .

". . . . . The statute confers no authority upon the Commission to enforce its directions to appear, testify or produce books and papers save by application to a Federal court under § 307(c) . . . . . Upon such an application by the Commission for the enforcement of its order, respondents would have full opportunity to contest its validity." (Emphasis added).

It thus appears conclusively that the Commission contention, "The Commission's order may not be reexamined in a District Court proceeding for its enforcement" (Comm. 21) is without support in the provisions of the Federal Power Act and identical provisions of other enactments, such as the Natural Gas Act and the National Labor Relations Act. Moreover, the decisions of the Supreme Court apply the unambiguous terms of said laws as enacted, not as Commission counsel propose. The attempt of coun-

sel (Comm. 27-29) to distinguish, particularly the provisions of the National Labor Relations Act but not those of the Natural Gas Act, from the identical enforcement and review procedures of the Power Act, is not responsive to the respective statutory provisions as written by Congress.

We now turn to the decisions (Comm. 10-11, 21-31) said to support the Commission contentions that the District Court proceeding is merely a mechanical operation.

*Fed Power Comm. v. Pacific P. & L. Co.,* 307 U. S. 156, 159 (Comm. 22), involved the question whether a Commission order denying the application of Pacific for Commission approval of a proposed transfer to Pacific of certain property including licenses under Part I of the Federal Power Act, was reviewable, because a negative order. The Supreme Court, affirming the decision of this Court (98 F (2d) 835), held the order of denial was reviewable under Section 313(b) of the Act. No question of enforcement was or could have been involved.

In *Safe Harbor Water Power Corp. v. Fed. Power Comm.,* 124 F (2d) 800, 804 (C. A. 3) (Comm. 22), conflict was found to exist between the statutory review under Section 20 of Part I of the Act and the newer review provisions of Section 313(b) of Part III of the Act, and the issue in the case was which section of the statute should prevail. The court held that Section 313(b) prevailed and that, to the extent of the conflict, Section 20 was repealed by implication. The conflict was between two separate and independent sections relating to review. Here again, the enforcement provisions of the Act were not under consideration.

*Piuma v. United States,* 128 F (2d) 601 (C.A. 9), does not hold that which counsel (Comm. 24) imply from their fragmentary quotation from the opinion. The issue sought to be made by Piuma was "that the Commission had no jurisdiction to make the order" involved in the case. The Court did not hold that the issue of the Federal Trade Commission's jurisdiction to enter the

order could not be raised in an action for penalties, though no petition to review it was ever filed. The Court did find and hold "The appeal is a frivolous one. Facts warranting the judgment were alleged in the complaint and admitted in the answer. Thus, instead of a defense, the answer was, in effect, a confession of judgment." The court actually passed on the defense of want of jurisdiction and found it to be without merit.

In *LaVerne Coop. Citrus Ass'n. v. United States,* 143 F. (2d) 415, 418, 420 (C.A. 9), (Comm. 24), this court in its opinion was careful to state "Appellants do not contest the constitutionality of the Act or the validity of order No. 53 *on its face*" (Emphasis added). And later in the opinion, it is emphasized "Again we note that we are not discussing *invalidity apparent on the face of such orders*".

Since the issue in the case at bar is "invalidity apparent on the face" of the Commission Opinion-Order of March 31, 1950, it would appear entirely clear that the *LaVerne* case is not relevant here.

In *Lichter v. United States,* 334 U. S. 742, 753, 790, 791, 792, affirming *Pownall v. United States,* 159 F (2d) 73 (C.A. 9) (Comm. 23, 25-26), the issues were defined by Mr. Justice Burton, speaking for the Court, as follows:

> "We have two main issues before us: (1) the constitutionality of the Renegotiation Act on its face and (2) the finality of the determination of the excessive profits made under it in the absence of a petition filed with the Tax Court within the required time, seeking a redetermination of those profits . . . . . In each case we uphold the constitutionality of the Act as providing the necessary authorization for the judgments rendered. We also accept the finality given by the courts below to the administrative determinations made of the excessive profits, although the statutory situation as a basis for the finality of such determinations is not precisely the same in each case. . . . . .
>
> . . . . .

"It expressly stated that 'A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo.' Sec. 403(e) (1). It provided also that *'In the absence of the filing of a petition with the Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order (of the Board) shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.'* (Emphasis added)

. . . . . .

"No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. . . . .

"We uphold the decisions below and the contentions of the Government to the effect that the statutory provision thus made for a petition to the Tax Court was not, in any case before us, an optional or alternative procedure. It provided the one and only procedure to secure a redetermination of the excessive profits which had been determined to exist by the orders of the respective Secretaries or of the Board in the cases before us . . . . ."

It is a far cry from the foregoing provisions of the Renegotiation Act to the actual provisions of the Power Act. There is nothing remotely similar in the two enactments. The issue in the *Lichter* case was the constitutionality of the Renegotiation Act *on its face* and the Supreme Court *passed upon* that issue in an action by the United States to recover alleged excess profits, notwithstanding the provision of Section 403(e)(1) above quoted. The question of constitutionality was *passed upon* to determine whether there was any legal foundation whatever for the Government's suit.

*Woods v. Kaye,* 175 F (2d) 886 (C.A. 9) arose under the Emergency Price Control Act of 1942, being an action by the Housing Expediter to compel restitution of rent overcharges. The landlord did not question the rent reduction except in its retro-

active aspect, i.e., the refund, and failed to properly follow the procedure of review provided in the Act.

Section 924(d) of the Act provides:

> "The Emergency Court of Appeals . . . . . shall have exclusive jurisdiction to determine the validity of any regulation or order of any price schedule . . . . ., and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the *validity of* any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside . . . . . any provision of this Act . . . . . or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

The constitutionality of the Emergency Price Control Act, and particularly Section 924(d), was *passed upon* and upheld in *Bowles v. Willingham,* 321 U.S. 503, 526, in a suit brought by the Price Administrator to restrain further prosecution of state proceedings and violations of the Act. The Court held there was no constitutional objection to confining relief against orders of the Adminsitrator to the Emergency Court of Appeals. It is odd that counsel should quote (Comm. 26) from the concurring opinion in that case of Mr. Justice Rutledge, who premised his concurrence in approving Section 924(d), as follows:

> "In my opinion, Congress can do this, subejct however to the following limitations or reservations which I think should be stated explicitly: (1) The order or regulation must not be invalid on its face. . . . ."

*Woods v. Kaye, supra,* following *Bowles v. Willingham, supra,* held that *no forum* was open to the landlord under Section 924(d) except the Emergency Court of Appeals to which she failed to go for relief. Congress *expressly* provided but one forum under the Emergency Price Control Act, as under the Renegotiation Act upheld in *Lichter v. United States, supra.* In the Power Act exclu-

sive jurisdiction over all violations of that Act is vested in the District Court, as the court of enforcement, with no express or implied limitations of the broad equity powers of such court. The Court of Appeals, as the court of "review", is invested with no general jurisdiction. The "exclusive jurisdiction" of that court can attach only if, as, and when in a particular case the review procedures prescribed by Section 313 of the Act have been complied with.

Under the Renegotiation Act the War Contracts Price Adjustment Board is directed to enter into the renegotiation of contract price on determination of excess profits "whenever, *in the opinion of the Board,* the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits . . . . ." (U.S.C. Title 50, App. § 1191(c) ) Therefore, conformably to the decision in *Shields v. Utah Idaho Cent. Ry. Co.,* 305 U.S. 177, 83 L. Ed. 111, 59 S. C. 160, such determination, even if wrong, does not defeat jurisdiction, for it still is "the opinion of the Board" which is the standard of jurisdiction fixed by Congress.

There is in the Renegotiation Act no prohibition of action prescribed within a defined statutory grant of power, as was present in the statute involved in *United States v. Idaho,* 298 U.S. 105, 80 L. Ed. 1070, 56 S.C. 690. There is an affirmative delegation of authority to the Contract Price Adjustment Board to proceed *on the basis of "the opinion of the Board,"* and nothing else. Under the Power Act, the jurisdiction of the Commission is not determined by "the opinion" of that body, but by the jurisdictional tests of Section 201(b) of the Act. See *Myers v. Bethlehem Corp.,* 303 U. S. 41, 49, 50, 82 L. Ed. 638, 643, 58 S.C. 459.

In *Yakus v. United States,* 321 U. S. 414, 88 L. ed. 834, 64 S.C. 660, the constitutionality of the Emergency Price Control Act was upheld, including the *express* exclusive statutory pro-

cedure for administrative and judicial review by the Emergency Court of Appeals. The Court in that case again pointed out that "There is no contention that the present regulation is void on its face . . . " (321 U.S. 447). The case is not authority here from any conceivable viewpoint.

Counsel stress the case of *United States v. Sing Tuck,* 194 U. S. 161, 48 L. Ed. 917, 24 S.C. 621, (Comm. 18-19). The controlling provision of the statute applicable in that case (Act, August 18, 1894; 28 Stat. at L. 390; Chap. 301, U.S. Comp. Stat. 1901, p. 1303) which has no counterpart in the Federal Power Act, reads as follows:

> " 'In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the *decision of the appropriate immigration or customs officers,* if adverse to the admission of such alien, *shall be final,* unless reversed on appeal to the Secretary of the Treasury." (Emphasis added).

In the anticipatory discussion by Commission counsel (Comm. 26-31) of the "cases cited by the Company", it is said that the same "were all cases in which the statute did not provide another, exclusive method of judicial review." The distinction sought to be made by counsel is vain and unrealistic. Section 313(b) of the Power Act relates to "review", while Section 317 thereof relates to "enforcement". They are not in conflict; nor is any part of Section 317 superseded by Section 313(b). Counsel indulge the pure assumption that the statutory "review" and the statutory "enforcement" are both "review". The provisions of the Act directly contradict such assumption. The District Court, as the enforcement court, expressly is vested with plenary and "exclusive jurisdiction over violations in all suits in equity and actions at law brought to enforce. . . . " In any enforcement proceeding, the first duty of the District Court is to determine whether the Commission order is valid, for if not, there is nothing to enforce.

## CONCLUSION

The Commission was and is without jurisdiction under the Federal Power Act, the sole source of its authority:

To issue and cause to be served original process in the nature of a complaint and summons in an adversary action directing Arizona Edison to respond and appear before it;

To make and enter its Opinion-Order of March 31, 1950, in which it found Arizona Edison to be a "public utility" under said Act and directed it to comply with certain regulatory provisions of the Act.

The lack of Commission jurisdiction, both personal and subject matter, appears on the face of the Commission Opinion-Order of March 31, 1950, and in the Commission's Complaint in this enforcement proceeding.

The District Court, as the court of enforcement, has the authority and duty to examine and determine the jurisdiction of the Commission in the premises and the jurisdiction of the Court itself in the enforcement proceeding.

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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